SOUTHERN BANK BHD

v.

SHIN HUAT JOO ENTERPRISE SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[SUIT NO: 22-102-1990]
30 APRIL 1998

BANKING: *Securities for advances - Continuing guarantee to secure trust receipt and overdraft facilities - Notice of demand - Whether necessary - Examination of terms of agreement - Intention of parties - Whether demand must be made prior to commencement of suit*

CONTRACT: *Guarantee - Continuing guarantee - Notice of demand - Whether essential - Intention of parties - Whether demand a term of the contract*

CIVIL PROCEDURE: *Action - Cause of action - Accrual of - Banks and debtors - Advancement of moneys - Whether cause of action arises instantly*

LIMITATION: *Acknowledgment of debt - Whether liability renewed on date of such acknowledgment - Whether time begins to run anew - Whether still caught by s. 6(1) of Limitation Act 1953 - Fact of acknowledgment not pleaded - Whether material*

BANKING: *Securities for advances - Overdraft and trust receipt facilities - Continuing guarantee - Interest rate - Unilateral variation of, by bank - Whether permissible - Whether absolves borrower of liabilities - Whether notice of variation required*

CIVIL PROCEDURE: *Action - Recovery of moneys - Action against guarantors - Whether may be commenced simultaneously with foreclosure proceedings*

BANKING: *Banks and banking business - Conclusive evidence clause - Use of - Whether acceptable in court - Relevance and proof - Strict adherence*

The plaintiff bank offered the 1st defendant overdraft and trust receipt facilities for which two properties belonging to both the 2nd and 3rd defendants were charged to the plaintiff. The 2nd and 3rd defendants were also the guarantors for those facilities. Due to default in payment by the 1st defendant, the two properties were foreclosed. The plaintiff subsequently brought an action against the defendants for the balance of the debt.

It was the defendants' contention that a notice of demand was a term of the agreement for each of the facilities, and not having received them the action was tainted and thus they had been absolved from liability. Further, the defendants argued that the action was time barred, the suit being brought after six years from the date the cause of action accrued. In addition, the terms of the contracts were varied and the plaintiff's claim was premature, for at the time of the filing of the suit, foreclosure proceedings were pending against them.

The plaintiff submitted that notices of demand were unnecessary, and the action being linked to land, the time limit was 12 years. Alternatively, the defendants having acknowledged the debt, limitation only started to run from the time of the acknowledgment. The issues to be settled by the court were: (i) whether in law there should be a demand notice before a suit; (ii) whether the action was time-barred and whether the non-pleading of acknowledgment of debt was fatal; (iii) whether the variations in the interest rates affected the contracts; (iv) whether the action was premature; and (v) whether the conclusive evidence clause should be strictly adhered to by the plaintiff.

Held:

[1] In respect of a continuing guarantee, a provision with the words 'in demand' does not automatically make a demand a term of the relevant agreement. The intention of the parties must be examined. In banking transactions which involve advancements in the like of loans, trust receipt advances and overdrafts, additional securities and letters of guarantee will be required and in these documents the question of whether a notice of demand is necessary will be reflected. There is no obligation in law to require the giving of any notice of demand prior to any suit, although parties may participate in a contract which requires it. In the present case, pertaining to the trust receipt and overdraft facilities demand notices were not the terms of the contracts. The only requirement was for the 1st defendant to pay up whatever was due or remained unpaid in the account.

[2] A cause of action is a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. It is the accepted banking practice, that once money is advanced by a bank, a debt accrues causing a cause of action to arise instantly. Unless payment is made within the stipulated period the bank may file the necessary legal action to recover that debt.

[3] If at any time after a debt is due and the debtor renews his promise to pay or acknowledges the debt as being due, he renews his liability on the date of such a promise or acknowledgment. If a suit is filed within six years after such a promise or acknowledgment has been made, the debtor thereafter cannot avail himself of the protection of s. 6(1) of the Limitation Act 1953. The promise or acknowledgment does not create a new debt but merely revives the old one. In the present case, for the purpose of the trust receipts, time began again for the 1st defendant on 24 December 1991 when there was acknowledgement of the payment of RM49,355. For the 2nd and 3rd defendants, time began on 7 May 1990, which was the date when the letters of demand were served on them for payment and which was within the time of 6 years from the last payment for the overdraft account and the trust receipts account.

[3a] Once there is an acknowledgment of the debt being due, and it is received in evidence as in a letter without objection, the consideration of that acknowledgment not being pleaded then becomes immaterial. The object of pleadings is to prevent surprise. In the instant case, the 2nd and 3rd defendants were directors of the 1st defendant and hence could not be said to have been taken by surprise.

[4] It is not unusual to detect terms which confer powers on the banks to vary the interest rates, which permit a movement at either direction by virtue of prevailing market forces. For the benefit of the borrower, he may terminate the agreement at any time as he desires, so long as he manages to pay off the balance. For any party to act unilaterally, the terms of the agreement must be clear and agreed upon. In the present case the provisions in the continuing guarantee and in the indemnity documents permitted the bank at any time and from time to time to stipulate the rate which it thought necessary and no prior notice was required. The unilateral acts of the plaintiff would neither release nor exonerate the defendants of their liabilities.

[5] The 'conclusive evidence clause' has been adopted and inserted in legal documents quite widely in the banking sector and has been recognised as necessary for the smooth conduct of business. The certificates not only assist the bankers in litigation but also in reducing lengthy explanations to clients. In the absence of fraud or obvious errors on the certificates, these documents are acceptable in court. The conclusive evidence clause in the continuing guarantee and the indemnity documents was only relevant in relation to the factor of proof in that the certificate would act as conclusive proof of the amount owing by the defendant at the date of certificate, but only if the processes built into that provision were strictly adhered to. It did not mean that if that enabling evidential provision was not complied with strictly, the defendants were absolved or exonerated from all liabilities.

[6] Creditors may commence action against guarantors simultaneously with foreclosure proceedings. They are at liberty to choose whichever course of action they desire so long as no provisions have been inserted in their agreements preventing the enforcement of that choice.

[Plaintiff's claim allowed.]

Cases referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(cit)***
Bangkok Bank Ltd v. Cheng Lip Kwong [1990] 1 CLJ 1017 ***(cit)***
Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409 ***(cit)***
Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors [1991] 2 MLJ 202 ***(cit)***
Bank Of Tokyo Ltd v. R Gnanasurian [1989] 2 CLJ 1275 ***(cit)***
Bian Chang Bank Bhd v. Kwong Hing Cheong [1978] 2 MLJ 193 ***(refd)***
Bradford Old Bank Ltd v. Sutcliffe [1918] 2 KB 833 ***(cit)***
Bumiputra Merchant Bankers Bhd v. Meng Kuang Properties Bhd [1991] 1 CLJ 718 ***(refd)***
Busch v. Stevens [1962] 1 All ER 412 ***(refd)***
Charles Robert Leader v. Henrietta Ada Leader & Another Appeal [1888] 3 Appeal Cases 294 ***(cit)***
Chong Yoong Choy v. UOL Factoring Sdn Bhd [1996] 2 CLJ 605 ***(cit)***
Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(cit)***
Co-operative Central Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144 ***(refd)***
Development & Commercial Bank Bhd v. Tengku Noone Aziz Tengku Mahmood & Anor [1988] 3 MLJ 228 ***(foll)***
Dobbs v. The National Bank Of Australia Ltd [1935] 53 CLR 643 ***(refd)***
Heng Cheng Swee v. Bangkok Bank Ltd [1976] 1 MLJ 267 ***(cit)***
KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(foll)***
Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors [1990] 1 CLJ 687 ***(refd)***
Lombard Tricity Finance Ltd v. Paton [1989] 1 All ER 918 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667 ***(refd)***
Letang v. Cooper [1965] 1 QB 232 ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 ***(refd)***
Malayan Banking Bhd v. Lim Chee Leng & Anor [1985] 1 CLJ 154 ***(refd)***
Malayan Banking Bhd v. Yap Seng Kee & Ors [1988] 1 MLJ 313 ***(cit)***
Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn Bhd & Anor [1988] 2 CLJ 87 ***(cit)***
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 ***(not foll)***
Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***
N Joachimson (A firm name) v. Swiss Bank Corp [1921] 3 KB 110 ***(refd)***
Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(cit)***

Northern Crown Bank v. Woodcrafts Ltd 33 DLR 367 ***(cit)***
Oversea-Chinese Banking Corp Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4 ***(refd)***
Re Jodrell, Jodrell v. Seale [1890] 44 Ch D 590 ***(cit)***
Sim Siok Eng v. Kong Ming Bank Bhd [1980] 2 MLJ 21 ***(refd)***
Spencer v. Hemmerde [1922] 2 AC 507 ***(refd)***
United Asian Bank Bhd v. Ceras Credit Sdn Bhd & Ors [1997] 2 CLJ Supp 587 ***(cit)***
United Asian Bank Bhd v. Dyalchands Sdn Bhd & Ors [1993] 4 CLJ 630 ***(cit)***
Vitol BV v. Compagnie Europeene Des Petroles [1988] Vol 1 Lloyd's Law Reports 574 ***(refd)***
Wee Kee Puan v. Oversea-Chinese Banking Corp Ltd [1982] 1 MLJ 64 ***(refd)***
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd [1989] 2 CLJ 1288 ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1), 14, 21(1), 26(2)

Other sources referred to:
The Interpretation Of Contracts, Kim Lewison, 1989, p 123

For the plaintiff - TK Kee; M/s Nik Hussain & Partners
For the defendants - En Krishnan; M/s Nordin & Phua

Reported by Michele Saw

JUDGMENT

Suriyadi Halim Omar J:

The plaintiff is a bank. For purposes of this case, it granted certain overdraft and trust receipt facilities to the 1st defendant, a company owned by the other two defendants who are husband and wife. The offer of the facilities were made *vide* a letter dated 21 January 1983. (pp. 1-2 Bundle A).

Pursuant to those facilities, the 2nd defendant charged two pieces of property in favour of the plaintiff, namely Lot No. 208 Geran No. 2769 Kawasan Bandar XXXI and Pajakan Negeri No. Pendaftaran 1243 Lot No. 176 Pekan Tanjong Kling Section 3. Apart from these two pieces of land charged, the 2nd and 3rd defendants also executed two Continuing Guarantee And Indemnity documents dated 7 November 1983, for the overdraft and the trust receipt facilities respectively. Due to the default in payments by the 1st defendant of both the facilities, and at the request of the 2nd defendant, and also by the subsequent acts of the plaintiff, the charged properties were foreclosed. Later this suit ensued as payments were not forthcoming in resolving the balance of the debts.

Four main points were aired by both parties during the hearing namely:

1. the issue of demand on the defendants;
2. whether the action was time barred;
3. there was any variation in the terms which affected the contract; and
4. whether the plaintiff's claim was premature.

At the outset, I must highlight that both parties in a substantial way, when submitting on the issues of one and three discussed extensively the clauses of the Continuing Guarantee and Indemnity documents signed by both parties. In short the question of construction played a prominent role.

The Necessity Of Demand Letters For Both The Facilities As Against The Borrower (1st Defendant)

The 1st defendant, as regards whether demand was made to it for either of the facility totally rejected that notion and brought my attention to the testimonies of PW1, PW3, DW1 and DW2 to support that stance. PW1 admitted receiving copies of the demand letters dated 7 May 1990 for the sum of RM728,152.15. PW3 did not know whether all the demand letters were ever returned although he did admit that D28 ie, the envelope addressed to the 1st defendant was returned. The 2nd defendant testified that he never received any demand letters on behalf of the 1st defendant. Similarly DW2 who is the 3rd defendant, also denied receiving B31, which is a demand letter. By virtue of para. 7 of A2, which is the letter of offer and of which non-adherence occurred, the defendants submitted that the action was therefore tainted and thus had absolved them from any liability. The 2nd and 3rd defendants ventilated that the notice of demand was a term in the agreement for each of the facility *vis-a-vis* the 1st defendant. The fact that D28 was confirmed to have been returned, as agreed by PW3, strengthened their assertion that no service of demand was made to the 1st defendant.

The plaintiff on the other hand submitted that as regards the borrower, a notice of demand was unnecessary, by reason of the silence of that requirement in the agreement. It further submitted that mere usage of the words "on demand" was insufficient to qualify it as a term of the agreement. In answer to this submission, suffice for me to opine that a provision in an agreement of this nature, the words "on demand" do not automatically make a demand a term of the relevant agreement. The intention of the parties must be gauged and it is therefore encumbent upon a judge to ascertain whether such a demand is a term by perusing the relevant documents. Suffice as a general introduction to this issue I refer to the case of *N Joachimson (A Firm Name) v. Swiss Bank Corporation* [1921] 3 KB 110 where Atkin LJ at p. 128 said:

> The question is in every case whether the parties have stipulated that a request shall be made. In the case of a note made payable on demand it is clear that the words "payable on demand" do not make a demand a term of the contract: ...

At p. 129 His Lordship further added:

> The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material.

Going on specifics Chang Min Tat FJ delivering the judgment of the Federal Court in *Sim Siok Eng v. Kong Ming Bank Berhad* [1980] 2 MLJ 21 at p. 22 para. D (right) commented:

> For ourselves in the case of an overdraft on a current account, we agree, with respect, with what Garth CJ said in *Ram Chunder Ghosaul v. Juggutmonmohini Dabee* at p. 294 that
>
> Where a man promises to pay a sum of money, etc. on demand, which it is his duty to pay whether a demand be made or not, then the money becomes payable at once, and no demand is necessary before suing him for it: as for instance, in the case of money lent, and money due for goods sold or for work done.
>
> The words "on demand" do not by themselves make a demand a term of the contract.

The above case met with a reversal when the Privy Council overruled that decision, after an appeal was filed by Kong Ming Bank Bhd, distinctly on the single legal poser of when time began to run. The facts of the case were that the bank had provided an unsecured overdraft facility to the appellant and by 28 June 1971 had drawn RM259,957.12 inclusive of interest. Thereafter for about three years the account remained dormant until 4 November 1974 when the appellant paid the bank RM65,000. On 4 April 1978 the bank's solicitors demanded payment of the balance owing and three days later a writ was issued against the appellant. The Privy Council decided that time began to run from the time the appellant made the payment of RM65,000 ie, on 4 November 1974 thus ensuring that the action was not time-barred. Inspite of the above case having been overruled, the principle pertaining the concept of notice of demand discussed by Chang Min Tat FJ still remains good law. To clarify further the Board never discussed this principle nor reversed it. The appeal was allowed on other grounds.

Prior to the above case the Federal Court in *Bian Chang Bank Bhd v. Kwong Hing Cheong* [1978] 2 MLJ 193 in clear terms also opined that in the absence of any evidence of any term that the overdraft was repayable on demand no necessity arose of the same. This view gained favour too in *Wee Kee Puan v. Oversea-Chinese Banking Corporation Ltd* [1982] 1 MLJ 64 when Salleh Abbas FJ said:

> It is settled law that ... no demand for repayment of debt is necessary for the accrual of the cause of action, unless there is a term in the overdraft agreement requiring such notice.

Paragraph 7 of Bundle A reads:

> You will, pay on demand all moneys which now are or may be owing to us or remain unpaid on the general balance of your account ...
>
> If the above terms and conditions are acceptable to you, please confirm your acceptance by signing ... otherwise ... treated as cancelled.

The above case unfortunately met the same fate as *Sim Siok Eng v. Kong Ming Bank Bhd* when the Privy Council reversed the decision. The judgment is reported in *Overseas-Chinese Banking Corporation Ltd v. Philip Wee Kee Puan* [1984] 2 MLJ 1. Mercifully the Privy Council through Lord Bridge of Harwich, when delivering the judgment of the Board, merely went on the singular issue of the letter of acknowledgment, which if constituted to be an effective acknowledgment, meant that the claim was not statute-barred. The Board decided that that letter was an effective acknowledgement and the appellant was therefore not prevented from proceeding with the legal action. Their Lordships never discussed the issue of notices of demands and therefore left the view of Salleh Abbas FJ intact and respectable.

I am satisfied, after having considered the above cases and after scrutinising para. 7 of the Letter of Offer as in Bundle A p. 2, a demand is not a precondition for an action against the 1st defendant. The word "on demand" there is not sufficient to be construed as a term in the contract.

Up to this stage, as supported by the above cases, regardless of the nature of the transaction, be it on the issue of money lent, money due for goods sold or for work done or for any overdraft facility, the obligation depends on the terms of the contract. On that premise too, for purposes of this case, pertaining to the trust receipt facility, as regards the 1st defendant, I have no hesitation in concluding that a demand notice is not a term of the contract. In the letter of offer are contained all the conditions connected to those facilities, eg, the interest factor, nature, term, existing facility/facilities, commitment fee, and the requirement to pay up whatever is due or remained unpaid in the 1st

defendant's account. I see no reason why there should be any differentiation in the treatment of the law regarding this matter for the overdrafts or trust receipts. There are not many authorities pertaining trust receipts, but suffice for me to refer merely to *Malayan Banking Berhad v. Lim Chee Leng & Anor* [1985] 1 MLJ 214, in which case the respondents being partners of a firm called Berjasa Corporation were being sued for debts incurred on some trust receipt facility prior to their resignation. The High Court Judge after hearing the appeal regarding the claim on interest disallowed it as the plaintiffs had failed to serve the respondents with the notice of demand. Lee Hun Hoe CJ at p. 215 (H) when disagreeing with the finding opined:

> The Trust Receipt matured and became due on June 14, 1975. No notice was necessary. The writ itself is a notice ...

To conclude on this issue of demand, under this subheading *vis-a-vis* the 1st defendant, I am fully satisfied that not only was the notice of demand (D28) for the overdraft sent to the 1st defendant returned undelivered but the notice for the trust receipts too had not been successfully served. Inspite of those failures, based on the above reasons of those notices not being required in the agreement, I cannot acquiesce to the submissions of the defendants that the case for the plaintiff was riddled with flaws and that they were absolved of all the liabilities.

The Necessity Of Demand Letters Against The Guarantors (2nd and 3rd Defendants)

It is the accepted banking practice, with particular reference to the current case, once money is advanced by a bank, a debt accrues causing a cause of action to arise instantly. Unless payment is made within the stipulated period, the bank may file the necessary legal action to recover that debt. These banking transactions which involve advancements in the like of loans, trust receipt advances, overdrafts etc, normally require additional security, which invariably require additional guarantors, who too will have to attest to letters of guarantee. The contents of those documents will reflect their intention, *inter alia* the necessity, or lack of it, of a notice of demand prior to any suit. It is axiomatic that there is no obligation in law to require the giving of any notice, though parties may participate in a contract which require it. On this issue I refer to the remarks of Lee Hun Hoe CJ in *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri bin Wan Rashidi v. Kwong Yik Bank Berhad* [1989] 2 CLJ 1288 at 1291 which reads:

> The document in question, that is, the Letter of Guarantee ... like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used. This intention is best ascertained by looking to the relative position of the parties at the time the Letter of Guarantee is written ...

Therefore, in a gist, the guarantee documents will codify the verbal agreements in which will be entrenched the respective liabilities and responsibilities of parties. Once the agreements are codified, courts invariably will resolve the matter in question by invoking and deciphering the provisions of the Letters of Guarantee (see *Bank Bumiputra Malaysia Bhd v. Esah binti Abdul Ghani* [1986] 1 MLJ 16 and *Malaysian International Merchant Bankers Berhad v. G & C Securities Sdn Bhd & Anor* [1988] 2 CLJ 87).

The Continuing Guarantee and Indemnity documents for the trust receipt (RM200,000) and the overdraft facility (RM270,000), signed on 7 November 1983 respectively by the 2nd and 3rd defendants, are found at pp. 29 to 34 of Bundle A. These documents are similar in contents eg, para. 15, which provides for the notice of demand, and it reads:

> Any notice or demand in relation to the matters aforesaid may be effectually given or made to me/us by any of your Officers or by notice in writing under the hand of any such officer either served personally on me/us or left for or sent by post to me/us at my/our address herein stated or at my/our address last known to you. In case of my death or the death of any of us and until you receive notice in writing of the grant of probate of his will or of administration of his estate any notice or demand by you sent by post as aforesaid addressed to such one of us or his personal representatives at his address last known to you or stated hereon shall for all purposes of this guarantee be deemed a sufficient notice or demand by you to such one of us and his personal representatives and shall be as effectual as if he were still living.

I was slightly perturbed by the ominous silence in the submission of the 2nd and 3rd defendants with regard to the issue of service of the notices of demand, and due to that silence proceeded to sift the notes of proceedings to discover the reason. The conclusion I arrived at was that the 2nd and 3rd defendants preferred to approach this issue by canvassing that they were absolved of all liabilities by reason of the plaintiff failing to stringently adhere to the terms of the contract.

The plaintiff testified to the effect that demand letters were sent to the 2nd and 3rd defendants *vide* letters dated 7 May 1990 (exhs. P17 and P18). These documents, corroborated by P17A, P17B, P18A and P18B which were certificates of posting, addressed to No. 93, Taman Sri Daya, Batu Berendam, Melaka were sent by registered post. Under cross-examination both the defendants admitted that they were staying at that particular address at the material time. Regarding the issue of service of this matter Salleh Abbas LP in *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 had this to say:

> In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors.

The law which is now quite established, in that mere "sending" is insufficient, has now been fine tuned by the necessity of proving that the notice has been served. This will require proof of posting and some other acceptable evidence that can convince a judge (*Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 1 MLJ 374). With the deeming provision available, strengthened by the documents having been sent to the correct address, the plaintiff will have no problems proving good service. Clause 15 in all its clarity provides that the notice of demand is deemed to have been served if sent to the last known address ie, the above said address mentioned in P17A, P17B, P18A and P18B. I am satisfied that not only were the notices delivered to the Post Office and acknowleged by the postal authorities but was also correctly addressed to the last known address. By this strict adherence of the contents of cl. 15, enforced by credible evidence, I am satisfied that the notices of demand were served on the 2nd and 3rd defendants (see *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 MLJ 413; *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; *United Asian Bank Bhd v. Ceras Credit Sdn Bhd & Ors* [1996] 4 MLJ 639).

The fact that the documents were signed by solicitors of the plaintiff should not be held against them as the conditions of the agreements permitted that course of action. The same said cl. 15 as regards this issue reads that "any notice ... may be effectually given ... by any of your officers or by notice in writing under the hand of any such officer." The plaintiff supplied me the case of *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 MLJ 428 and I sought guidance from that Supreme Court case. In that case a clause similar to cl. 15 was commented by Jemuri Serjan SCJ favourably at p. 432 para. I (left) in these terms:

> In any event we also noted that cl. 11 of the first guarantee admits of flexibility in the mode of making the demand in that it is not a mandatory but a discretionary requirement for the notice of the demand to be effectually given by a bank officer. In view of the discretionary nature of the requirement under cl. 11 it is therefore proper and valid for the solicitor to act on behalf of the bank by signing and sending the notice of the demand to the appellant.

Whether The Action Is Time-Barred

The issue of limitation is, in a large way connected to the legal precept of "cause of action", based on the fact or facts which bestow a person the right to judicial redress or relief against another. In other words, in term of time or state of facts, a situation will arise which will entitle a particular party to

sustain an action and permit him to seek judicial remedy on his behalf (*Black's Law Dictionary* 6th Edn). I seek guidance also from the case of *Nasri v. Mesah* [1971] 1 MLJ 32 where Gill FJ at p. 34 B-E (right) said:

> A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown*). In *Reeves v. Butcher* Lindley LJ said:
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> This expression, 'cause of action' has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cayzer, Irvine & Co.* Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach.

Lord Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232 at p. 242 defined a cause of action to mean "a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person." The next relevant issue to be resolved is when did the cause of action of the current case begin. The complexity of the facts necessitate me to discuss the law regarding this sub-heading as the defendants have alleged that the case is time barred. At the outset, it was not denied that the writ of summons was filed on 23 November 1990, claiming RM770,452.25 up to the period of 13 November 1990. This sum was later amended to RM522,012.46, split between the overdrafts and the trust receipts, inclusive of their respective interests. The demand letters were issued on 7 May 1990 as against the 2nd and 3rd defendants. As regards the overdraft facility the last payment date was 20 July 1984 when cheque No. 163684 was cleared. With regard to the trust receipts, *vide* PW1, the defendants have alleged that B15/16 was the last time the trust receipt facility was utilised, with no repayments made by 27 June 1984 ie, the last due date. Therefore by due mathematical calculations when the writ of summons was issued on 23 November 1990 both the facilities would be time-barred by at least three to four months. The defendants further contended that inspite of the invocation of the Limitation Act 1953, as per the defences filed on 23 January 1991, the plaintiff never countered that allegation and hence were bound by their pleadings.

The plaintiff has alleged that the two pieces of land charged as security were part and parcel of the preconditions agreed upon prior to the facilities being granted. These properties were eventually sold, with RM270,000 being channelled as payment for the overdraft facilities on 22 May 1991 and RM49,355 channelled on 24 December 1991 to the trust receipt facility. The plaintiff proceeded on a two-prong argument, namely that as land was involved, the limitation period therefore would be twelve years and not six pursuant to s. 21(1) of the Limitation Act. Alternatively, the plaintiff argued that the acknowledgement payments of RM270,000 on 22 May 1991 and the payment of RM49,355 on 24 December 1991 brought the action within the six year period. For purposes of the first argument s. 21(1) of the Limitation Act reads:

> No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

By virtue of the availability of that legal choice I find it unnecessary to pursue the first argument but merely rely on the alternative version. Due to that course of action s. 26(2) of the Limitation Act 1953 therefore would be highly relevant. This provision reads:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

Currently the law, as I understand it regarding acknowledgement of debts, is that if at any time after a debt is due and the debtor renews that promise to pay it or acknowledges that debt as being due, he therefore renews his liability on the date of such promise or acknowledgement. If a suit is filed within six years, after that promise or acknowledgement had been made, the debtor thereafter cannot avail himself of the protection of s. 6(1) of the Limitation Act 1953 (Act 254). This promise or acknowledgement in reality does not create a new debt but merely revives the old debt. Lord Sumner in *Spencer v. Hemmerde* [1922] 2 AC 507 viewed that that acknowledgement "continues or 'renews' or 'establishes' the original promise ... corresponds with and is not at variance from or in contradiction of that promise". Lawton J in *Busch v. Stevens* [1962] 1 All ER 412 equated that acknowledgement or payment for any debt equivalent to being "given a notional birthday and on that day ... rises again in renewed youth." These views were met with approval by the

Federal Court in the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10 when Raja Azlan CJ in no uncertain terms said that an acknowledgement of a statute-barred claim did not raise a new claim or a new cause of action but constituted the accrual of a right of action to recover the debt. Lord Bridge of Harwich for the Privy Council in *Oversea-Chinese Banking Corporation Ltd v. Philip Wee Kee Puan* [1984] 2 MLJ 1 approved that view and thenceforth reversed the decision under appeal. Apart from approving the above statements of law, the Privy Council opined that once the acknowledgement, in that case a letter, was received in evidence without objection, the consideration of the acknowledgement not being pleaded then became immaterial. Once the letter was received in evidence and a suit ensued well within the period of six years, from the date of the letter, the appellant's claim therefore was not statute barred. For completeness permit me to return to the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail (supra)* where Raja Azlan Shah CJ in clearer terms at p. 11 para. H (right) said:

> But it is a matter of indifference to the court whether the plea of acknowledgement is pleaded in the statement of claim or in the reply ... Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply. Be that as it may ... we think there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice ...

For purposes of the trust receipts, *vis-a-vis* the 1st defendant, time began again on 24 December 1991 when there was an acknowledgement of the payment of RM49,355. As regards the 2nd and 3rd defendants time began on 7 May 1990, as that was the date when the letters of demand were served on them for payment, a period well within the time of six years from the last payment for the overdraft account or the trust receipts account respectively (see also *Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202; *Bradford Old Bank Limited v. Sutcliffe* [1918] 2 KB 833). The last payment for the overdraft account, prior to the payment on 25 May 1991 was 30 November 1985, when a sum of RM4,000 was credited, whilst for the trust receipt the date was 31 January 1985 when RM68,000 from the proceeds of sale of the charged property were paid into the trust receipts' account (exh. P26 p. 1 Bundle F).

To regurgitate, not only were the 2nd and 3rd defendants incapable of availing themselves of the defences of the Limitation Act by virtue of the demand letters, but also the 1st defendant because of the acknowledgement of those payments. In fact the current case is on all fours with the case of *K.E.P.*

Mohamed Ali v. K.E.P. Mohamed Ismail as not only were there no objections to the payments, thus taking it outside the purview of the Limitation Act, but the 2nd and 3rd defendants being directors of the company undoubtedly could not have been taken by surprise by the pleadings of the plaintiff.

Whether There Was Any Variation In The Terms Which Affected The Contract

The defendants alleged that the letter of 21 January 1983 offered 14.5% per annum as the rate of interest for the overdraft facility. Inspite of the crystal clear terms in the letter of offer, the plaintiff still charged an additional 1% interest for any amount that exceeded RM270,000. This resulted in two sets of figures for the interests, namely 14.5% for any sum below RM270,000 and 15.5% for anything above that for the overdraft facility. This term of adding 1% to anything above RM270,000 according to the defendants was never mentioned in the letter of offer. Then in May 1991 the rate of interest was varied to 12.25% for anything below RM270,000 whilst charging an interest of 13.25% for anything above it. Eventhough this variation was advantageous for the defendants, it still drew flack, as that downward variation was never mentioned in the letter of offer.

As regards the trust receipts' account the offer was made subject to interest chargeable at the rate of 13% per annum for foreign bills and 15% per annum for inland bills thus indicating that the bank would charge only simple interest annually. Subsequently in the Continuing Guarantee and Indemnity (A29), the rates of the letter of offer were again not adhered to when the figures were changed to 12.5% per annum for foreign bills and 14.5% for inland bills. Aside from the amount of the interest, the defendants alleged that cl. 1 of the Continuing Guarantee and Indemnity provided for compound interest, totally not in consonant with the conditions laid down in the letter of offer which prescribed a simple yearly interest. By virtue of these variations the 2nd and 3rd defendants alleged that they therefore had been discharged of their liabilities. Two cases were cited by the defendants namely *Co-Operative Central Ltd. (In Receivership) v. Meng Kuang Properties Bhd.* [1991] 2 CLJ 1144 and *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors* [1990] 1 MLJ 485. In a gist the first case decided that a wrongful demand for any payment of something, to which the chargee was not entitled, must necessarily render the notice of demand ineffectual and invalid as those notices would be demanding for payments of something of which they had no right to. As to the second case the variation of any terms which prejudiced the chargor by virtue of lack of knowledge or consent discharged the guarantor of his obligations in respect of the guarantee. In the current case the defendants have similarly alleged that those variations had been inserted in the agreements without their consent and knowledge.

To understand this legal issue it is worthwhile to reproduce extracts from the two material documents. The letter of offer regarding interest reads:

Interest/Commission

Overdraft : At 14.5% per cent per annum, monthly rest (or at such other rate(s) the Bank may at its absolute discretion prescribe from time to time).

...

...

Trust Receipts : Interest will be chargeable at the rate of 13.0 per cent per annum for foreign bills and 15.0 per cent per annum for inland bills (or at such other rate(s) the Bank may at its absolute discretion prescribe from time to time).

Clause 1 of the Continuing Guarantee and Indemnity (A29-31) and (A32-34) respectively reads:

1. We will pay you on demand upon us all money and liabilities ... Provided that the total recoverable from us hereunder (exclusive of the interest) at the rate of 12.5% per annum for foreign bills and 14.5% per annum for inland bills (for the overdraft facilities to read 13.5% per annum) with monthly rests and exclusive of such charges and expenses hereinbefore specified is limited to the sum of Ringgit Two Hundred Thousand only (RM200,000) (for the overdraft facility to read Two Hundred And Seventy Thousand only) (RM270,000) ...

If not for the percentage of the interest and the sums to be expanded the provision of cl. 1 is similar for both the trust receipt and overdraft facilities. The facts also revealed that for both facilities interest was to be on monthly rests. The letter of 21 January 1983 only offered initially the monthly rests concept for the overdraft and not the trust receipts. Therefore a change occurred in relation to the terms by the time the guarantee documents were signed. The trust receipt facility similarly from a mere yearly rests basis metamorphosised to that of monthly rests.

Let us now peruse the other provisions. Clause 3 of the Annexure of the charge (A3) reads:

Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the Bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the Customer(s) and the Chargor(s) of such its intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

Clause 1 of the Annexure of the charge reads:

> The Chargor(s) will on demand pay to the Bank all sums of money which are now or shall from time to time hereafter be due or owing by the abovenamed Shin Huat Joo Enterprise Sdn Bhd ... solely or jointly with any other persons ... in respect of any other banking facilities to ... an aggregate sum of Dollars Four hundred and twenty thousand only (RM420,000) together with interest thereon at the rate of 14.5% per annum for RM270,000 overdraft account and Trust Receipts RM150,000 at 13% per annum for foreign bills and 15% per annum for inland bills per annum with monthly rests ... include any and such other rate which the bank may at any time and from time to time stipulate in the manner hereinafter appearing.

At the outset it is crystal clear that cl. 3 of the Annexure as per the charge (A8), is inapplicable as against the 2nd and 3rd defendants, as that provision be spoke of the necessity to inform only the chargor of any variation in the interest rate. Whether the plaintiff had succeeded in convincing me that their acts were not improper and in accordance with the agreements will depend on whether the answers extracted are in the positive for these questions, *viz.* that:

1. the bank had the absolute discretion to vary the interests;
2. the words were clear in permitting the bank to act unilaterally;
3. the agreement was lawful;
4. there was no necessity of any prior notice to be given to the guarantor; and
5. the plaintiff was entitled to charge compound interest as against the facilities.

Transactions which involve overdrafts and trust receipt facilities are not abnormal in the kind of economy that is currently being practised by Malaysians. Parties are at liberty to participate, whether as borrowers or as lenders, with the bank normally being the lender and companies or individuals being the borrower. When parties are locked into contract, the theory is that the bank is to loan the required sums of money whilst the borrower, not only will repay the outstanding balance if any, but theoretically has the capacity to repay that debt. Whether both parties were on equal footing at the opening stages of the negotiation is irrelevant, though trite and accepted that after an agreement has been signed, *prima facie* the contents are pursuant to their agreement and consent. It therefore is not unusual to detect terms which may confer powers on the banks to vary the rates, which may permit a movement at either direction, by virtue of prevailing market forces. Similarly for the

benefit of the borrower, he may terminate the agreement at any such time as he desires, so long as he manages to pay off the balance. Notwithstanding the above, it must be emphasised that for any party to act unilaterally or otherwise, the terms in the agreement must be clear and agreed upon.

To appreciate the terms of the current case, it is therefore necessary for me to study the relevant documents, in particular the specific provisions that I have reproduced above. I thus will have to be subject to the canons of construction to seek out and ascertain the intentions of the parties. Kim Lewison in *The Interpretation Of Contracts* [1989] in clear terms at p. 123 wrote:

> The canons of construction are no more than pointers to discovering the presumed intention of the parties to a written contract. They are not to be slavishly applied, and where they point in different directions the court must select those which will produce a reasonable and just result.

Saville J in *Vitol BV (Formerly t/a Vitol Trading BV) v. Compagnie Europeene Des Petroles* [1988] Vol. 1 Lloyd's Law Reports p. 574 at 576 said:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole.

(See also *Re Jodrell. Jodrell v. Seale* [1890] 44 Ch. D. 590 and *Charles Robert Leader v. Henrietta Ada Leader* and *George F. Duffey v. Amyatt Edmond Ray* [1888] 3 Appeal Cases 294).

A case direct in point is the case of *Lombard Tricity Finance Ltd v. Paton* [1989] 1 All ER 918 where His Lordship Staughton LJ at p. 923 said:

> In general it is no doubt unusual for a contract to provide that its terms may be varied unilaterally by one party, in his absolute discretion, to the detriment of the other; in general one would require clear words to achieve that result. But in this particular case it is, we think, part of the background, matrix or surrounding circumstances that market rates of interest are known to vary from time to time and that some variation was very likely to occur during the lifetime of this agreement. There is also provision that the borrower may bring it to an end of any time by repaying the amount outstanding. In theory he could thus avoid the effect of an increase rate, if he found it unattractive. But

> we recognise that in practice this remedy is unlikely to be available, since he is unlikely to have the money, or to be able to borrow it from some other lender at less than the prevailing market rate.

Having perused the Continuing Guarantee and Indemnity documents I am satisfied that cl. 1 permits the bank at any time and from time to time to stipulate the rate which it thinks necessary. In other words the provision permits the bank either to reduce or increase the rate. Aside from that right, the bank also is not burdened while carrying out its administrative act, of the necessity of informing the 2nd and 3rd defendants of the changes. In the case of *Development & Commercial Bank Bhd v. Tengku Noone Aziz bin Tengku Mahmood & Anor* [1988] 3 MLJ 228, the term on the rate of interest payable which stated "15% p.a. until further notice", was viewed to mean that the rate was subject to increase or decrease at the discretion of the plaintiff. Similar to the current case where no prior notice is required, the court there opined that as there was no provision as to prior notice or that the consent of the defendant was required before the plaintiff could exercise its right to revise the rate of interest, the action of the bank there to revise the rate was in order (see also *United Asian Bank Bhd v. Dyalchands Sdn Bhd & 3 Ors* [1993] 4 CLJ 630).

As I indicated much earlier, the eventual document signed and stamped for the trust receipts, had some variations from the original offer. For the trust receipts, instead of the interest being charged on a yearly basis, it now is on a monthly rests basis. Even the amount of interest for both the facilities differ from the original offer. The plaintiff submitted that there was nothing untoward in its act to base the interest for the trust receipts on the basis of monthly rests, as the words "monthly rests" here meant that the unpaid interest had become capital sum at the end of every month and therefore was correctly charged. In support of this argument the case of *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 was adverted to, in particular the remarks of Chang Min Tat FJ, at p. 20 which reads:

> In *Yourell v. Hibernian Bank,* Lord Atkinson described the practice of bankers in debiting interest to an overdrawn current account periodically and thereby increasing the capital sum, which is the effect of the provision for periodical rests", as "a usual and perfectly legitimate mode of dealing between banker and customer", though it meant securing for the bank the benefit of compound interest.

Eventhough I agree with the explanation of the plaintiff as to what "monthly rests" means the act of justifying the charging of the compound interest on the trust receipts was unnecessary, as apart from charging compound interest being a normal practice in the banking sector for spill-overs of debts, I find the contents of cl. 1 wide enough to permit those charges. If I may add, the provisions in that relevant Continuing Guarantee and Indemnity were carefully worded and had a role to play in their transactions.

Regarding the overdraft facility, cl. 1 in its relevant Continuing Guarantee and Indemnity document, in no uncertain terms did provide for a monthly rests interest provision. In other words, the terms accorded in the documents be it in the Annexures of the charges or the guarantee documents were terms which were carefully thought of, as reflected by their structure and succinctness. The insertion of the provision of the compound interest is on all fours with the remarks of NH Chan J when he said in *Bumiputra Merchant Bankers Berhad v. Meng Kuang Properties Berhad* [1991] 1 CLJ 718 "they should make express provision for compound interest in their contracts: s. 14 of the Act".

Even if there had been any unlawful variations in the interest rates, which in this case was advantageous to the 2nd and 3rd defendants, that does not discharge the latter of their liabilities. In other words the Continuing Guarantee and Indemnity documents are still valid. This is so as case laws have established that contracts of this nature are not construed as one initial contract but an occurance of a contract in every advance. The respective Continuing Guarantee and Indemnity document merely covered the various advances made by the bank (*Nothern Crown Bank v. Woodcrafts Ltd* 33 DLR 367).

Lastly I would like to touch on cl. 5 of the respective Continuing Guarantee and Indemnity documents which reads:

> 5. This guarantee and indemnity shall not be prejudiced, diminished or affected nor shall I (we or any/either of us) be released or exonerated by any of the matters following:
>
> (i) Any advance you may make or credit overdraft you may give to the Customer(s) beyond the extent aforesaid.
>
> (ii) Your refusal at any time or times with or without notice to us or to the Customer(s) to grant any further credit accomodation to the Customer(s) notwithstanding that the limit or extent of this guarantee and/or indemnity shall not have been reached and you may at any time in your sole discretion refuse such further credit or accommodation.

(iii) Any other guarantee, indemnity, security negotiable or otherwise which you may now or at any time hereafter hold from the Customer(s) or from me/us or any other person or persons in respect of any money hereby guaranteed.

(iv) The variation, exchange, renewal, release or modification of any such Guarantee/Indemnity, or securities, or the refusal or neglect by you to complete enforce or assign any judgment speciality or other security or instrument negotiable or otherwise and whether satisfied by payment or not.

(v) ...

Subject to the canon of construction after perusing the above clauses, I am satisfied that the provisions are wide enough to permit the plaintiff not only to vary, modify, increase or decrease but also to change the basis of the interests without prior consent of the defendants. The unilateral acts of the plaintiff will neither release nor exonerate the defendants of their liabilities as provided for in the respective Continuing Guarantee and Indemnity documents (see *Malayan Banking Bhd v. Yap Seng Kee & Ors* [1988] 1 MLJ 313; *Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLJ 267 and *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282). Clause 12 of the Continuing Guarantee and Indemnity, which is the principal debtor clause, plugs any escape routes or loose ends that could be exploited by the 2nd and 3rd defendants (*Chong Yoong Choy v. UOL Factoring Sdn Bhd* [1996] 2 CLJ 605).

The defendants created some initial doubts in my mind when they invoked cl. 6 of the Continuing Guarantee and Indemnity documents which provides as follows:

> I/We agree to be bound by any account which before such demand as aforesaid has been settled between you and the Customer(s). If no such account has been settled immediately before such demand a certificate in writing signed by the Manager or Accountant or other duly authorised officer of your Office shall be accepted by me/us conclusive evidence of the amount owing to you by the Customer(s) at the date of such certificate.

The defendants alleged that prior to any demands or legal action, the plaintiff should have taken the first step of preparing an account as between the plaintiff and the 1st defendant company. If a sum had been agreed upon then that would have been conclusive evidence of debt owed and due from the latter. If no such account was taken then a certificate should have been issued which similarly would have to be accepted by the 2nd and 3rd defendants as the conclusive amount owed by the 1st defendant. The guarantors alleged that there was absolutely no adherence to this provision, and being what they were,

namely guarantors, they were thus entitled to insist on a rigid adherence to the terms of obligation by the creditor (*YM Orang Kaya Menteri Paduka Dato Wan Ahmad Isa Shukri bin Wan Rashidi v. Kwong Yik Bank Berhad* [1989] 2 CLJ 1288). Without mincing words I interpret this conclusive evidence clause to be relevant only in relation to the factor of proof, in that a certificate may act as conclusive proof of the amount owing by the defendants at the date of such a certificate, but only if the processes built into that provision are strictly adhered to. It does not mean that if this enabling evidential provision is not complied with strictly the defendants therefore are absolved or exonerated from all liabilities. There is nothing in that provision which prevents the plaintiff from proving its case by normal or ordinary admissible evidence as envisaged by the Evidence Act 1950. In *Dobbs v. The National Bank Of Australia Limited* [1935] 53 CLR 643 the court said:

> ... This clause does not purport to impose upon the bank the necessity of obtaining the certificate it describes. It is not a qualification of the undertaking to pay contained in the first clause. It does not make a certificate a condition precedent to recovery. The promise remains a promise to pay the amount owing; it does not become a promise to pay the amount owing if certified of a promise to pay only what is certified as owing. The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that, for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. ...

These kind of provisions have been adopted and inserted in legal documentations quite widely in the banking sector and have been recognised to be necessary for the smooth conduct of business. The certificates not only assist bankers for litigation purposes but also assist them in reducing lengthy explanations to clients thus avoiding unnecessary mail or verbal communications between parties. To wind up this matter, in the absence of fraud or obvious error on those certificates, these documents are receivable in court. Time consuming proceedings also have been tremendously reduced by such insertions in the relevant documents (*Bangkok Bank Ltd v. Cheng Lip Kwong* [1990] 2 MLJ 5).

The last issue at hand is whether the claim is premature bearing in mind that foreclosure proceedings were pending when the summons were filed. I do not intend to stray too much into this territory as it is settled law that creditors may commence action against guarantors simultaneously with foreclosure proceedings. They are at liberty to choose whatever course of action they desire so long as no provisions have been inserted in their agreements preventing enforcement of that choice (see *Bank Bumiputra Malaysia Bhd v. Esah binti*

Abdul Ghani [1986] 1 MLJ 16; *Malaysian International Merchant Bankers v. G & C Securities Sdn Bhd & Anor* [1988] 2 CLJ 87; *Bank Of Tokyo Ltd v. R Gnanasurian* [1989] 2 CLJ 1276).

For the reasons stated above I therefore order judgment as prayed to prayer 10(a), 10(b)(i), (ii) and (iv) and 10(c) as per the amended statement of claim.